

September 30, 2014

Rod Hsiao, Trustee
San Mateo County Board of Education
14 S. Eldorado Street
San Mateo, CA 94401

Re: Your Request for Advice
Our File No. A-14-152

Dear Mr. Hsiao:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090.¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the San Mateo County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

As a Trustee of the San Mateo County Board of Education ("County Board"), may you sell a product to school districts in San Mateo County that is marketed through a non-profit, tax

¹ Normally, we would also analyze your question under the conflict of interest provisions of the Political Reform Act (the "Act"), which is contained in Government Code Sections 81000 through 91014. However, because we conclude in this letter that Government Code Section 1090 prevents you from making contracts with school districts under the general aegis of the San Mateo County Board of Education, we need not further analyze the same issue under the Act. For purposes of this letter, all statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

exempt public-benefit corporation that you are founding and from which you would receive a salary and benefits?

CONCLUSION

No. Under these circumstances, Section 1090 prohibits you from making or participating in making contracts with school districts in San Mateo County.

FACTS

You are an elected Trustee of the County Board. You are also founding a public-benefit organization, called InPlay, which would be tax-exempt under the rules of the Internal Revenue Code. InPlay would promote and sell an online service to schools that would enable their school's families to easily search and register for local, age-appropriate after-school and summer camps for their children. Increasing student participation in after-school and summer programs has been shown to improve academic performance, increase attendance, and lower discipline issues. You will receive annual salary and benefits from InPlay.

Schools that choose to subscribe to the service would potentially pay for the integration with their school website and possibly a small annual licensing fee. The bulk of revenue would come from charging service fees to the after-school or camp providers. You will be selling throughout the San Francisco Bay Area and ultimately nationwide. You will not be selling InPlay's services to the San Mateo County Office of Education, but would like to offer InPlay's services for sale to the 22 school districts in San Mateo County.

You stated that in your official role as Trustee, you can only directly influence individual county school districts in two types of matters: student inter-district transfer appeals and student expulsion appeals. A county board of education only approves its own county budget, but does not oversee, review, or approve local school budgets. For reference, you have attached the "Statutory Functions of County Boards of Education & County Superintendents of Schools" issued by the California County Superintendents of Educational Services Association which details the county's fiscal accountability and oversight of local districts.

In a previous letter to you, *Hsiao* Advice Letter, No. A-14-002, we considered whether it was permissible under Section 1090 for you to sell a similar service, entitled "Activity Hero," to county school districts as part of a for-profit business from which you would have received an annual salary and equity share in the business. In that letter, we concluded that Section 1090 prohibited you from making or participating in making contracts with individual San Mateo County school districts and that, therefore, you were not permitted to sell this service to these schools.

ANALYSIS

As set forth in our previous letter to you (*Hsiao* Advice Letter, No. A-14-002), Section 1090 generally prohibits public officers from being financially interested in contracts made by them in their official capacity or made by boards or commissions of which they are members. (87 Ops.Cal.Atty.Gen. 23, 24 (2004).) The purpose of Section 1090 “is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official’s decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) The statutory goal is “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Regarding the application of Section 1090 to governmental bodies such as the San Mateo County Board of Education, our letter stated that when a governmental board ultimately has the authority over the contracts made by a subordinate agency, generally the board members have participated in the resulting contract, thereby triggering Section 1090 by exercising their authority to review or not to review the contracts. (See *City of Imperial Beach v. Bailey, supra*, 103 Cal.App.3d at p. 195 [where the city council has authority to approve the city’s unilateral action to set the rate charged to a concession stand, “it is not [the councilmember’s] participation in the voting which constitutes the conflict of interest [under Section 1090], but her potential to do so”]; 88 Ops.Cal.Atty.Gen. 122, 124 (2005) [a city council has indirectly participated in the city’s decisions regarding advertising rates in the city’s quarterly brochure because “in effect” the city council approves the advertising rates in approving the proposed revenue derived from advertising specified in the city budget]; 87 Ops.Cal.Atty.Gen. 9 (2004) [the governing board of a school district may not avoid Section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district].)

Based on these interpretations of Section 1090, we considered in our previous letter whether the County Board’s authority over the districts within San Mateo County was sufficient to establish that the board members effectively participated in contracts made by school districts in the county. Our analysis was guided by the California Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, which applied the “*in pari materia*” canon of statutory construction to conclude that Section 1090 should be harmonized with the Act’s conflict of interest provisions when possible.² Although broader in its application than Section 1090, like Section 1090, the Act also prohibits public officials from participating in government contracting decisions in which they have a financial interest. (See Section 87100.) However, while Section 1090 is silent on when a member of a governmental body effectively participates in the making of contracts by agencies subordinate to that body, the Act and its interpretive regulations provide a road map for making this determination. As previously explained, under the applicable regulations interpreting the Act, a governmental body and the agencies over which it has budgetary control are considered to be the same agency for purposes of the Act’s conflict of interest provisions. (Section 87100 and Regulation 18702.3(a).) As also explained, we have

² Statutes are “*in pari materia*” if “they relate to the same person or thing, to the same class of person[s] or things, or have the same purpose or object.” (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn.4.)

long-advised that when the controlling agency and another body share the same staff, the other body is tantamount to being the same as the controlling agency and, consequently, is deemed to essentially share the budgetary control of the controlling agency. (See *Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190; *West* Advice Letter, No. A-88-413; and *Farrell* Advice Letter, No. I-03-121.) Finally, we explained that regulations interpreting the Act generally prohibit an official whose agency has budgetary control over another agency from appearing before the other agency to influence a decision in which he or she had a financial interest. (Regulation 18702.3(a) and (b).) We thus concluded that, since the San Mateo County Superintendent of Schools had budgetary authority over county school districts and shared staff with the County Board, the County Board and county school district were essentially the same agency. As such, because Section 1090 prohibits the entire County Board (which, under this analysis includes county school districts and any other official or agency in the chain up to the County Board) from approving contracts in which one of its members is financially interested, we advised that you, as a Trustee of the County Board, could not contract with county school districts.

You have submitted additional information on the issue of the County Board's authority over contracting by county school districts. We have reviewed this information and do not discern any additional facts that would cause us to reconsider our previous position that, albeit indirect, the County Board has some degree of control over local school districts and thus over their contracting activities. However, the circumstances of your potential financial interest in contracts with county school districts has changed and this requires additional analysis.

In your previous letter, you would have been contracting with school districts through a for-profit entity and receiving not only an annual salary from the contracting for-profit but also would have owned an equity share in that business. Under the current facts, the contracting will take place through a non-profit entity you will be founding and from which you would receive a salary and "benefits," which we presume to mean normal employee benefits such as possible insurance, pension, 401(k) account, or matters related to things such as free parking or pre-tax health and childcare expenses.

In *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, the First District Court of Appeal found that, under Section 1090, "if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract . . ." (*Id.* at p. 228.) In arriving at that decision, the court noted that, although the public official who was alleged to have violated Section 1090 participated in his official capacity in making a contract with his private employer, there was no evidence that the contract would affect the official's "salary, benefits, or status." (*Id.* at p. 227.) On this basis, it is perhaps possible that your non-profit employer's sales of InPlay to school districts in San Mateo County would have no effect on your "salary, benefits, or status" with the non-profit and that Section 1090 would therefore be inapplicable. However, your position on the County Board and the current circumstances as described in the facts undermine this proposition. As a member of the County Board, it is likely that your best initial prospects for sales would be the school districts in San Mateo County. Also, you would be the founder of the non-profit and it appears likely at this

stage that the level of your salary and benefits would be affected by the level of income received from sales of InPlay. Based on these factors, we are not prepared at this stage to say that you would not be financially interested in sales of InPlay to San Mateo County school districts.

Apart from the issue raised by the *Eden* case, Section 1091 contains exceptions to the general rule that precludes a government body such as the County Board from making or overseeing the making of a government contract when one of its members is financially interested in the contract. This is the so-called “remote interest” exception, which, under specified conditions, permits the body to make or oversee the making of the contract if the financially interested member does not participate in any way in the contracting decision and follows other specified procedures. (See Section 1091(a).) One exception that is arguably applicable here is under Section 1091(b)(1), which provides that a member of a government body has a “remote interest” when he or she is “an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation . . .” Thus, assuming the non-profit entity you are founding meets the criteria under this provision, the County Board arguably would be permitted to make or oversee the making of a contract between the entity and a county school district so long as you did not participate in any way in the making of the contract. However, based on our conclusion above, in which we view San Mateo County school districts and the County Board to be essentially the same agency for purposes of the Section 1090 analysis, it is not possible for any “remote interest” exception to apply here. Essential to the “remote interest” exception is that the official not participate in any way in the contracting decision. By appearing before a San Mateo County school district you essentially would be directly participating in your agency’s own contracting decision, thereby negating application of the exception.

Based on the foregoing and the facts presented, we conclude that Section 1090 prohibits you from making or participating in making contracts with school districts in San Mateo County.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

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